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NOTE AND COMMENT

SIMPLIFICATION OF JUDICIAL PROCEDURE IN FEDERAL COURTS.—In 1914 the Judiciary Committee of the House of Representatives unanimously reported favorably upon a bill (H. R. 133) authorizing the Supreme Court of the United States to prescribe by rule the forms, kind and character of the entire pleading, practice and procedure to be used in all actions and proceedings at law in the federal courts, with a view to their simplification, which rules should, when promulgated, take precedence of any law in conflict therewith. On January 2, 1917, a similar bill (S. 4551) was favorably reported from the Senate Judiciary Committee by a distinguished graduate of this Law School, Senator SUTHERLAND. The concurrence of the Judiciary Committees of the two houses of Congress gives promise of an early enactment of this legislation.

While many other activities of Congress have attracted more attention than this effort to promote uniformity in federal court procedure, it is doubtful whether any will have more far-reaching beneficent consequences. The purpose of the so-called "UNIFORMITY Act" of 1872 (R. S. 914), was to save the bar from the double burden of two systems of procedure in law cases, one State and the other federal. Such an eventuality was one which the profession might well hope to escape. But in practice it was found that real uniformity was impossible. The loophole provided by the language "as near as may be" was more and more resorted to by the federal courts

to avoid conformity with local rules of practice which did not seem just and reasonable, with the result that an immense number of precedents for non-conformity have been established, destroying to a large extent the very uniformity in procedure which it was the purpose of the ACR to establish.

On the surface, the proposed regulation of federal procedure by the Supreme Court aims only to recognize the actual divergence between State and federal practice and to improve the latter in a systematic fashion. This would be a great gain in itself, for the present hybrid practice in the federal courts is intrinsically unsatisfactory and creates confusion as between the various federal districts.

But the real effect of a uniform system of federal practice would almost certainly be far greater than this. The States have been groping about more or less blindly for seventy years trying to reform procedure. The early promise of the FIELD CODE has not been fulfilled. The "CODE" is in large measure a failure. Statutory modifications of the common law system have been tried again and again with indifferent success. They all failed in the most vital place,—they were fixed and mandatory legislative enactments imposed upon the courts, instead of rules by which the courts guided their own efforts to do justice to litigants. In a few conspicuous instances, such as New Jersey in 1912, Colorado in 1913, and Virginia in 1916, the States themselves have taken up the court-rule system of procedure, but progress has been exceedingly slow.

If, now, the Congress of the United States approves the court-rule plan, and it is put into effect with the wisdom and ability which we have the right to expect from the United States Supreme Court, the movement for reform along this line, so successfully pursued in England and Canada, will gain enormous force and prestige, and it will very likely become the dominant system among our States. But more than that may confidently be expected. An effective system of court rules will be put into operation in the federal courts sitting in each State, and that system will undoubtedly tend to become the model for the systems which may be looked for in the several States. The merit of the federal Supreme Court rules ought to be enough to commend them generally, but the great additional advantage to accrue from identity of procedure in the State and federal courts will exert a still more powerful influence.

Procedure thus seems to enjoy a unique position in the United States. It is the only subject of legislation over which the federal authorities have full coordinate jurisdiction with the States, and it offers the only opportunity for a federal system to serve as a model for State adoption. So that procedure, which has lagged so long and suffered so many vicissitudes, bids fair to become one of the pioneers of uniformity.

E. R. S.

WHAT WORDS CREATE A POWER?—As the right to sell may exist either as a result of ownership, or by virtue of a power without or independent of ownership, it is sometimes a question whether words indicating a right to sell, contained in an instrument granting an estate, are intended to give a power, or are merely descriptive of the rights incident to the estate given.